

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 74 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

CHHOTALAL JAMNADAS & CO

Versus

UNION OF INDIA

Appearance:

MR VMIAL PATEL For MR KS NANAVATI for Petitioner
MR JC SHETH for Respondent No. 1

CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 20/07/2000

ORAL JUDGEMENT

This is plaintiff's appeal against the judgment and order dated 27.9.1979 rendered by the learned Judge of the City Civil Court, Court No. 6, Ahmedabad in Civil Suit No. 2887/75, whereby the plaintiff's suit came to be dismissed.

The plaintiff filed aforesaid suit to recover Rs. 25,168.88ps with 12% interest from the date of the suit and costs from the Railway Administration on the ground that the plaintiff entered into a handling contract with the Western Railway from 27.7.55 to 26.7.58, that it was extended from time to time up to 31.3.1960, that the work under the contract was completed, that the bills in

respect thereof were submitted from time to time, that they were accepted by the Railway Administration and that instead of making full payment, Rs. 25165.88 were withheld as deposit out of the said bills, and that such withholding of the said amount on the part of the defendant-Railway Administration was illegal and improper. As regards the stand of the defendant that the amount was withheld for demurrage charges at the transshipment, dump and repacking points which might be found due from the plaintiff-contractor in connection with the contracts awarded on 14.10.1959 and 9.6.60 respectively, it was the case of the plaintiff that nothing was found due and outstanding against the plaintiff in connection with the said contracts. Hence, the plaintiff prayed for the amount wrongfully withheld by the defendant. After a delay of 13 years and long drawn correspondence during this period, the Chief Commercial Superintendent of the Western Railway was unable to substantiate the claim towards alleged demurrage and other charges and he agreed to retain only Rs. 3000/ and release remaining amount. He accordingly agreed to refund the balance amount of Rs. 22000/, by his letter No. C/237/21/8/Vol.II dated 6th March, 1973. According to this letter, instructions were issued to Traffic Accounts Officer, Ajmer to refund the balance amount. Since, no refund was granted, the plaintiff was constrained to give notice under sec. 80 of Code of Civil Procedure making demand of Rs. 25165.88ps illegally and wrongfully withheld. Even thereafter, the defendant did not pay the amount and, therefore, plaintiff was required to file the suit as aforesaid.

The defendant defended the suit as per written statement exh. 12. While denying the allegations contained in the plaint, it has been asserted that the amount of Rs. 25168.88ps came to be withheld out of the bills submitted by the plaintiff towards demurrage charges due in terms of clause 10(i) and 10(ii) of the contract. It has further been asserted that the plaintiff was to submit the bills for the work done under clauses 5 and 6. The defendant was authorised to make proper deductions for demurrage charges and other charges under the said contract. As per clause-6 of the contract, if the contractor did not claim payment within three months of such services being rendered, he should be deemed to have waived his right and would not be entitled to any payment. The last payments for the work done upto 31.3.1960 were made on 9.11.1960 and on 21.1.61, while due deductions were made on 9.11.1960. Thus, the alleged claim remained as waived by virtue of

clause-6 of the contract. The alleged claim also became time barred latest by and after 21.2.1964. It has been contended that the said amount was on account of lawful deductions for demurrage charges at transshipment, dump and repacking points. The defendant was entitled to withhold payment even for other works under clause 8(b) of the contract. However, the demurrage was payable under clause 10 of the contract also. Under all these circumstances, the claim of the plaintiff became time barred and the so-called correspondence referred to by the plaintiff would not save the limitation. The letter dated 6.3.73 cannot be treated as an unconditional acknowledgment of liability as no officer is competent to acknowledge time barred debt. Even if it were to be held unconditional acknowledgment it is not made within three years from the expiry of the period of limitation as aforesaid, hence also, it will not save the period of limitation.

Following issues were framed at exh. 21.

- 1) Does plaintiff prove that Rs. 25165.88ps has been illegally withheld by the defendant?
- 2) Does defendant prove that he was entitled to demurrage charges at transshipment, dump and repacking points ?
- 3) Is the suit barred by limitation ?
- 4) Is the notice under sec. 80 of Civil Procedure Code, valid and legal ?
- 5) Is the plaintiff's firm registered under the Indian Partnership Act ? If yes, is the registration valid and legal ?
- 6) What decree and order ?

The trial court found that the amount of Rs. 25165.88ps was not withheld illegally, and that the suit was barred by Law of Limitation by holding that the defendant-Railway Administration was entitled to demurrage charges at transshipment, dump and repacking points. The learned trial judge has, therefore, held that the amount was rightfully withheld, and he, therefore, dismissed the suit directing the parties to

bear their own costs.

I have heard the learned counsels for the parties.

The short point that has been agitated before this Court is that exh. 39 dated 6.3.1973 would not only save limitation in favour of the plaintiff, but would support the plaintiff's stand about the claim to be rightful. Ex. 39 would read as under:

"An amount of rs. 25,000/ had been withheld from your monthly handling bills and kept in deposit by traffic Acconts Office, Ajmer. because of the final decision, in regard to recovery of demurrage charges amounting Rs. 24090.96 paise was not taken.

It has been decided to retain an amount of Rs. 3000/ only towards demurrage charges, and to refund the balance.

In this connection, instructions has already been issued to the Traffic Accounts Office, Ajmer to do so."

In this connection, the learned trial judge has observed as under:

"The plaintiff's oral evidence in support of the contention is that of Baijnath, the Office Superintendent of the plaintiff ex. 40. He does not give the details as to under what head or description all the intems of this amount were deducted. The witness was employed by the plaintiff since 1961. According to him, agreement ex. 13 did not provide any demurrage clause. It was for the first time introduced in the agreement in 1963. Hence the plaintiff is not liable to pay any demurrage charges. On the basis of this version, it is urged that the deduction is unlawful. as regards the contention of limitation the witness stated that the railways never took up the contention about limitation in the correspondence with plainitff. The amount was treated as deposit and hence there would be no bar of limitation. In cross-examination he stated that if there are omissions or errors in the previous bills passed, the consequential deductions can be made from the successive bills even if the same is beyond six months. But in the absence of relevant copies of bills in his possession he could not say from what bills the railways deducted about Rs. 25,000/. Such deductions were made not only within

the period of 3 months from the preparation of the bills, but also from the subsequent bills. But he was sure that all the deductions made were from the bills payable under the agreement and its extended period. He further admitted that the plaintiff maintains regular account books which would show the various deductions made by the railway from time to time. However, the figure claimed in the suit was based on the statement prepared from the account books. He could not say when the last deduction was made from the plaintiff's bills. But he admitted that all the bills of the plaintiff under this contract were submitted before he joined plaintiff's service and all the deductions were also made from such bills. These deductions made by the defendant were from the bills submitted not later than 1961. In fact, the railways at the instance of the plaintiff furnished the particulars of deductions described as recovery by the railways order ex. 48 and the statement accompanying thereto. This statement shows that the deductions are made from certain bills of March, 1960. They were in fact received and registered by the office of accounts officer in July, 1960. The deductions were also made in July, August and November, 1960. The details thus show that the total amount of Rs. 25165-88 have been recovered. The statement, however, shows that this amount was past and kept in deposit. Similarly, in letter reproduced above the railways have used the phrase "that the amount has been withheld from your monthly handling bills and kept in deposit by traffic accounts office, Ajmer." This amount was withheld according to the railway pending final decision in regard to recovery of demurrage charges amounting to rs. 24090.26 paise. It is very easy for the plaintiff's witness to deny that there was no term of charging demurrage and such term was introduced for the first time in 1963. But the agreement between the parties is ex. 23. It has come into force from 27th July, 1955 and was to come to an end on 26th July, 1958. The said agreement was further extended up to 31st December, 1958 by ex. 34. It is the plaintiff's case that it was also extended to 31st March, 1960. That letter for extension which is described as minute sheet, is, however, not on record, but there is no dispute that the original agreement ex. 23 only extended that period vide ex. 34. So far as the liability to pay demurrage is concerned, it is mentioned in para-10 of the contract ex. 23. Sub-clause (ii) of para 10 provided that demurrage will also be charged at the rate applicable to public traffic as in force from time to time at the station, free time being 5 day light hours for the purpose and the free time commencing from the time the wagon is placed in positions for loading or unloading as

the case may be. Where night work is stipulated in the Agreement the free time will be give hours, irrespective of day or night time, and demurrage will be leviable for all the time taken in excess of the free time" Realising the force that demurrage is chargeable under clause 10(ii) of the agreement Shri BA Shah for the plaintiffs tried to make a distinction between the deductions made in the instant case relating to demurrage charges at transshipment, dump and repacking point and not ordinary demurrage. This clarification though mentioned in the plaint and almost admitted in the written statement para 8 is not, however, borne out by the contract. The agreement provides the particulars of work. So in schedule A attached to it, different stations with details of work are described. So far as Nadiad is concerned the rate are mentioned separately for transshipment of ordinary goods from BGT to NG. It also provides special rates for transshipment of bulky goods from BG to NG and vice versa. Similarly, there is provision at various stations for transshipment of general goods from sick to sound wagons. So far as stations at nos. 11 to 24 are concerned, there is provision for transshipment of general and ordinary goods and special rates are provided if the goods to be transhipped were cotton bales and SR and TR van, bulky goods like coal, stone, road metal, sand, lime, gypsum etc. There is provision for transshipment of motor cars and trucks. Even in respect of Sabarmati and Viramgam stations there is provisions for unloading one wagon into the dump and for re-loading from the dump. At the fag and of this schedule, it is alsoprovided that the rate for loading for dump per wagon, will apply to quantity of coal equivalent to that unloaded from the Broad guage wagon irrespective of the numberof metre guage wagons loaded with such quantity. In the notes appended to this schedule, note no. (iii) refers that payment for the weight of local packages loaded into and unloaded from SR and TR vans, and from repacking vans, should be deducted from the general goods handling bills. The other schedules arenot relevant for the purpose of this suit. But the various items referred by me from the schedule of the agreement would indicate that the defendant was entitled to deduct demurrage charges for the work even at the transshipment, dump and re-packing points. The very fact that specific rate was mentioned for transshipment from BG to MG wagons and reference is made to the loading and unloading from BG to MG and vice versa would certainly show that this work was not only specifically intimated to the plaintiff, but the defendant was also entitled to deduct demurrage charges under clause (ii) of clause 10 of the agreement. Hence, it is not possible to

hold that the amount has been illegally withheld by the defendant."

In the above view of the appreciation of the evidence, the submission that ex. 39 would renew the claim of the plaintiff or bring it within the period of limitation can hardly be accepted. As a matter of fact, the letter dated 16.12.1975 appearing at ex. 48 encloses a statement wherein complete details of recovery of Rs.. 25165.88ps have been set out. That letter has been issued from Traffic Accounts Officer, Ajmer and addressed to Mr. Nair, SCO(G)/CCG. Therefore, the alleged admission in the aforesaid letter has ultimately become a matter of difference between two officers of the Railway Administration with regard to the working of its claim. The statement gives recovery figures and is initialed on 4.12.75. As stated above, it has been enclosed with the aforesaid letter dated 16th December, 1975. In my considered opinion, therefore, the plaintiff's claim cannot be pursued even in equity, apart from the fact that ex. 39 will not save period of limitation which already ran against the plaintiff years before the suit was filed and much more than 3 years before ex. 39 was issued.

In the above view of the matter, short submission made on behalf of the appellant that ex. 39 would renew the plaintiff's claim or acknowledge it so as to bring it within limitation under sec. 18 of the Limitation Act, cannot be accepted.

In the result, following order is passed.

This appeal is dismissed with no order as to costs.

mandora/